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05-18-01133-CR
FIFTH COURT OF APPEALS
DALLAS, TEXAS
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NO. 05-18-01133-DR

**IN THE
COURT OF APPEALS
5TH JUDICIAL DISTRICT
DALLAS, TEXAS**

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
2/8/2019 1:39:54 PM
LISA MATZ
Clerk

ROBERT EARL HARRELL, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

**ON APPEAL IN CAUSE NUMBER
2017-1-0644
FROM THE COUNTY COURT AT LAW NO. 1
OF GRAYSON COUNTY, TEXAS
HON. JAMES HENDERSON, presiding**

APPELLEE'S BRIEF

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ORAL ARGUMENT REQUESTED

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NO. 05-18-01133-DR

IN THE
COURT OF APPEALS
5TH JUDICIAL DISTRICT
DALLAS, TEXAS

ROBERT EARL HARRELL, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

TO THE HONORABLE COURT OF APPEALS:

COMES NOW THE STATE OF TEXAS, hereinafter referred to as the State, and submits this brief pursuant to the Texas Rules of Appellate Procedure and would show through her attorney the following:

ISSUES PRESENTED

RESPONSE POINT 1:

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE APPELLANT OPERATED A MOTOR VEHICLE.

RESPONSE POINT 2:
THE ADMISSION OF A 911 CALL , WHICH WAS NONTESTIMONIAL IN NATURE DID NOT VIOLATE THE APPELLANT'S 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES.

SUMMARY OF ARGUMENT

In his first ground the appellant alleges that the evidence did not prove that he actually operated a motor vehicle while intoxicated. Specifically, he claims the facts of this case were insufficient to corroborate the appellant's admission that he had been driving the vehicle.

April Cully, a dispatcher with the Van Alstyne Police Department, testified that she was a custodian of records for the 911 system used by her department. Ms. Cully identified State's Exhibit 1 as the 911 call from incident number 17-000194 on March 5, 2017, at 4 in the morning. State's Exhibit 1 describes a gray van driving recklessly southbound on Highway 75. Officer Brandon Blair, formerly of the Van Alstyne Police Department, testified that he received information from dispatch of a gray van driving recklessly, with a license plate number of GRW-6089, was notified that the vehicle had taken exit , proceeded to that exit, was further notified that the vehicle had pulled into the McDonald's parking lot and was parked near the gas pumps, and located the vehicle. When the officer approached the vehicle, observed the appellant in the driver's seat with his seatbelt still fastened. The appellant informed the officer that he hand his companions had been at the Choctaw Casino since 7:30 and had been drinking and admitted driving the van.

A reasonable trier of fact could have found that appellant was intoxicated at the time he drove the motor vehicle and that the evidence of the same was not so weak or against the overwhelming weight of the evidence as to be manifestly unjust. The evidence is sufficient to show that appellant operated a motor vehicle in a public place while he was intoxicated.

In his second point of error, appellant contends that his confrontation rights were violated by admitting the recording of the 911 telephone call. He argues that a non-testifying complainant's statements to a 911 operator are testimonial and are, therefore, barred by the Confrontation Clause under *Crawford v. Washington*. The trial court properly admitted the 911 audiotape into evidence.

A review of the 911 recording (SX1) in this case shows that any reasonable listener would recognize that the speaker who called the 911 system was facing an ongoing event. The speaker was reporting a reckless driver in a gray van traveling south on highway 75 who was unable to maintain its lane on the highway and needing emergency response immediately. The caller also reported that the van exited at exit 51 and parking near the gas pumps in the McDonald’s parking lot. The nature of what was asked and answered, when viewed objectively, was such that the

elicited statements were necessary to effectively address the present emergency, rather than simply to learn what had happened in the past. The complained-of statements were not made under circumstances that would lead an objective witness to reasonably believe the statements would be available for use at a later trial. The statements on the 911 tape were nontestimonial and, therefore, the trial court's admission of this tape did not violate appellant's rights under the Confrontation Clause.

ARGUMENT

RESPONSE POINT 1:

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE APPELLANT OPERATED A MOTOR VEHICLE BECAUSE THE APPELLANT'S ADMISSION TO OPERATING THE MOTOR VEHICLE WAS SUFFICIENTLY CORROBORATED BY THE FACTS OBSERVED BY THE ARRESTING OFFICER.

In his first ground the appellant alleges that the evidence did not prove that he actually operated a motor vehicle while intoxicated. Specifically, he claims the facts of this case were insufficient to corroborate the appellant's admission that he had been driving the vehicle.

A. STANDARD OR REVIEW FOR LEGAL SUFFICIENCY

In conducting a legal sufficiency review, the appellate courts consider all the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In this review, the appellate courts are not to reevaluate the weight and credibility of the evidence, but to ensure that the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

B. PROOF OF CORPUS DELICTI WITH ADMISSIONS BY A DEFENDANT

To be sufficient, the corroborating evidence need only permit a rational finding of guilt beyond a reasonable doubt when considered in conjunction with the extrajudicial confession. *Fruechte v. State*, 166 Tex. Crim. 496, 316 S.W.2d 418, 419 (1958); *Turner v. State*, 877 S.W.2d 513, 515 (Tex. App.—Fort Worth 1994, no pet.). "The corpus delicti rule is one of evidentiary sufficiency affecting cases in which there is an extrajudicial confession." *Miller v. State*, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015).

"The rule states that, when the burden of proof is beyond a reasonable doubt, a defendant's extrajudicial confession does not constitute legally sufficient evidence of guilt absent independent evidence of the corpus delicti." *Id.* (alteration and quotation omitted). "To satisfy the corpus delicti rule, there must be evidence independent of a defendant's extrajudicial confession showing that the essential nature of the charged crime was committed by someone." *Id*. (alteration and quotation omitted). The corpus delicti rule requires corroboration of two elements of a crime—"an injury or loss and a criminal agent"—but there need not be any independent evidence that the defendant was the criminal culprit. *Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002).* As long as there is some evidence corroborating the confession, the confession may be used to aid in the establishment of the corpus delicti. *Id.*

The corpus delicti of driving while intoxicated is that someone drove or operated a motor vehicle in a public place while intoxicated. *Threet v. State*, 157 Tex. Crim. 497, 250 S.W.2d 200 (1952). In *Folk v. State*, 797 S.W.2d 141, 144 (Tex. App.-Austin 1990, pet. ref'd), the defendant argued that the corpus delicti was not proven because there was no evidence other than his extrajudicial statement tending to prove that he was driving the car. The court there found that evidence that the vehicle was registered to a

person with whom the defendant lived was sufficient to corroborate his admission that he was driving the vehicle that night. *Id.*

C. SUFFICIENCY ANALYSIS

The appellant argues that the evidence is insufficient to show that he was intoxicated at the time he was operating the motor vehicle because the officer did not personally observe the appellant driving the gray van. April Cully, a dispatched with the Van Alstyne Police Department, testified that she was a custodian of records for the 911 system used by her department. (RR vol. 3, p. 46) Ms. Cully identified State's Exhibit 1 (hereinafter SX1) as the 911 call from incident number 17-000194 on March 5, 2017, at 4 in the morning. (RR vol. 3, pp. 50, 68-69) State's Exhibit 1 describes a gray van driving recklessly southbound on Highway 75. (SX1)

Officer Brandon Blair, formerly of the Van Alstyne Police Department, testified that he received information from dispatch of a gray van driving recklessly, with a license plate number of GRW-6089. (RR vol. 3, p. 90) Officer Blair was notified that the vehicle had taken exit 51. (RR vol. 3, p. 90) Officer Blair proceeded to that exit and was further notified that the vehicle had pulled into the McDonald's parking lot and was parked near the

gas pumps. (RR vol. 3, pp. 90-91)

Officer Blair located the vehicle and approached the car, observing the appellant in the driver's seat with his seatbelt still fastened. (RR vol. 3, p. 92) The appellant informed the officer that he hand his companions had been at the Choctaw Casino since 7:30 and had been drinking. (RR vol. 3, p. 95) Believing that the appellant might be intoxicated, the officer conducted a DWI investigation. (RR vol. 3, pp. 95-107) During the investigation, Officer Blair testified that the appellant admitted driving the van, as follows:

> Q. (By Mr. Sissney) Officer, can you -- it's kind of quiet on the video. Can you explain the gist of the conversation right here?
>
> A. He -- so he says to me that every time this happens -- or, he was afraid that I was going to take him downtown -- I assume, take him to jail -- every time this happens, and I asked him why. He said because every time this happens, and then he said something to me along the lines -- and so, at this point, I could see that, you know, he appears to be frustrated. So, I explained to him that I understand he may not agree with everything that was going on, but I explained to him that he was reported as a reckless driver and -- and he says, well, I'm parked here, and I said, but you were driving and he replies, well, yeah.
>
> Q. Okay. So, he admitted to you that he was driving?
>
> A. That's correct.

(RR vol. 3, p. 107)

A reasonable trier of fact could have found that appellant was intoxicated at the time he drove the motor vehicle and that the evidence of the same was not so weak or against the overwhelming weight of the evidence as to be manifestly unjust. Considering appellant's statements, along with the fact that the vehicle had just parked near the McDonald's and that the appellant was buckled into the driver's seat, the evidence is legally sufficient to show that appellant was driving the gray van prior to being approached by Officer Blair. The evidence is also legally sufficient to show that appellant operated a motor vehicle in a public place while he was intoxicated.

RESPONSE POINT 2:

THE ADMISSION OF A 911 CALL , WHICH WAS NONTESTIMONIAL IN NATURE DID NOT VIOLATE THE APPELLANT'S 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES.

In his second point of error, appellant contends that his confrontation rights were violated by admitting the recording of the 911 telephone call. He argues that a non-testifying complainant's statements to a 911 operator are testimonial and are, therefore, barred by the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177

(2004).

A. THE RIGHT TO CONFRONT THE WITNESSES AGAINST YOU

The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The appellant argues that the trial court improperly overruled the appellant's Confrontation Clause objection to the admission of a 911 recording.

In 2004, the Supreme Court held that the Confrontation Clause "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross examination." *Crawford*, 541 U.S. 36 (emphasis added). Though it did not explicitly define the term, the Court delineated the parameters of "testimonial," applying it "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id. Crawford* thus holds that a "core class of 'testimonial' statements" includes: (1) ex parte in-court testimony, (2) affidavits, (3) depositions, (4) confessions, (5) custodial examinations, and (6) statements made under circumstances that would lead an objective

witness reasonably to believe that the statement would be available for use at a later trial. *Crawford*, 124 S. Ct. At 1374. The issue in this case is whether the 911 call from an unidentified caller falls within the class of statements defined as testimonial under the last category.

In *Davis v. Washington*, the Supreme Court clarified the distinction between testimonial and nontestimonial statements, holding that:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, supra, at 2273–74. In *Davis*, the Court held that a 911 tape of Davis's girlfriend reporting that Davis had assaulted her was not testimonial, and therefore its admission did not violate the confrontation clause. *Id.* at 2277.

B. DETERMINING WHETHER A STATEMENT IS TESTIMONIAL

In determining whether statements are testimonial, Texas courts

generally have looked to the degree of formality of a declarant's interaction with police, the purpose and structure of police questioning, and the likelihood that the declarant expects that the statements could be used in a criminal prosecution. *See e.g., Spencer v. State*, 162 S.W.3d 877, 882 (Tex. App.—Houston [14th Dist.] 2005, pet. Ref'd). For example, statements made to police during contact initiated by a witness at the beginning of an investigation are generally not considered testimonial. *See id.* at 883 (holding that initial police-victim interaction at crime scene was non-testimonial); *Tyler v. State*, 167 S.W.3d 550, 555 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding that victim's explanation of what transpired was non-testimonial because it merely aided start of investigation and officer did not ask questions); *Wilson v. State*, 151 S.W.3d 694, 698 (Tex. App.—Fort Worth 2004, pet. Ref'd) (holding statements were non-testimonial because there was no interrogation when witness initiated contact with police and purpose of officers' questions was not to elicit information about known criminal activity).

Specifically, statements made during 911 calls are generally non-testimonial. *Ruth v. State*, 167 S.W.3d 560, 569 (Tex. App.—Houston [14th Dist.] 2005, pet. Ref'd) (stating "we see nothing in the record suggesting that this call, in which a witness to a crime in progress at her

home summoned the police, deviates from the typical, non-testimonial 911 call").

Another example was In *Wall v. State*, 184 S.W.3d 730 (Tex. Crim. App. 2006). In *Wall*, the court of criminal appeals determined an assault victim's out-of-court statements made during a hospital interview were made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial, thus implicating the Confrontation Clause. *See id.* at 745. The court of criminal appeals discussed the "muddled" state of the law as to whether excited utterances may or may not be classified as testimonial hearsay. *Id.* at 739–42. It concluded that the excited utterance and testimonial hearsay inquiries are separate, but related, and the parallel inquiries require an ad hoc, case-by-case approach. *Id.*

Thus, a reviewing court should first determine whether a particular hearsay statement qualifies as an excited utterance. If so, the court then looks to the attendant circumstances and assesses the likelihood that a reasonable person would have either retained or regained the capacity to make a testimonial statement at the time of the utterance. *Id.* The *Wall* court then explained that, generally, statements made to the police while the declarant is still in personal danger are not made with consideration of their

legal ramifications because the declarant usually speaks out of urgency and a desire to obtain a prompt response. Thus, those statements will not normally be deemed testimonial. *Id.* at 742 (*citing United States v. Brito*, 427 F.3d 53, 61–62 (1st Cir. 2005), petition for cert. filed, (U.S. Jan. 17, 2006)).

C. THE 911 RECORDING IN THIS CASE WAS NON-TESTIMONIAL

With these principles in mind, it is clear that the trial court properly admitted the 911 audiotape into evidence. Courts applying *Davis* have held statements to be nontestimonial even though they were not describing events as they were happening. *See, e.g., Martinez v. State*, 236 S.W.3d 361, 365, 374–75 (Tex. App.—Fort Worth 2007, pet. ref'd, untimely filed) (holding that statements made by appellant's son were nontestimonial under Davis, even though they described past events in which appellant gave son a bag to hide in his pants).

A review of the 911 recording (SX1) in this case shows that any reasonable listener would recognize that the speaker who called the 911 system was facing an ongoing event. The speaker was reporting a reckless driver in a gray van traveling south on highway 75 who was unable to maintain its lane on the highway and needing emergency response

immediately. (RR vol. 3, pp. 51-52; SX1) The caller also reported that the van exited at exit 51 and parking near the gas pumps in the McDonald's parking lot. (SX1)

The nature of what was asked and answered, when viewed objectively, was such that the elicited statements were necessary to effectively address the present emergency, rather than simply to learn what had happened in the past. The conversation between the caller and the 911 operator was obviously to get the driver stopped so as to avoid any accidents caused by the driver of the van's recklessness. (SX1) The caller made the statements to the 911 operator under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. The circumstances do not objectively indicate that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. The complained-of statements were not made under circumstances that would lead an objective witness to reasonably believe the statements would be available for use at a later trial. As such, he statements on the 911 tape were nontestimonial. Therefore, the trial court's admission of this tape did not violate appellant's rights under the Confrontation Clause.

PRAYER

WHEREFORE, the state respectfully prays this court affirm the judgment and conviction herein.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was eserved, faxed or mailed to:

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STATE'S CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface and word limit requirements of the Texas Rules of Appellate Procedure. This document contains 3,046 words, exclusive of the caption, the identity of parties and counsel, the statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the statement of issues presented, the statement of jurisdiction, the statement of procedural history, the signature, the proof of service, the certification, the certificate of compliance, and the appendix.

/s/ *Karla R. Baugh* FEBRUARY 8, 2019
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